

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT BILLET PROMOTIONS, INC. : CIVIL ACTION
 :
 v. :
 :
 IMI CORNELIUS, INC., et al. : NO. 95-1376

MEMORANDUM AND ORDER

HUTTON, J.

March 30, 1998

Presently before the Court is the Defendants' Motion in Limine to Preclude Plaintiff's Evidence on Damages Relating to Moving Costs and Attorney's Fees (Docket No. 56). For the reasons that follow, the Defendants' Motion is denied.

I. BACKGROUND

Plaintiff, Robert Billet Promotions, Inc. ("RBT"), filed this action on March 3, 1995.

On July 20, 1995, Defendants IMI Cornelius, Inc. ("Cornelius") and Remcor Products Company ("Remcor") served RBT with their First Request for Production of Documents. Item 14 of the Request demanded production of "All documents, including but not limited to correspondence, notes, memoranda, and other records relating to damages sustained by Plaintiff as a result of the alleged acts or omissions of Defendants as set forth in Plaintiff's Complaint."

On September 5, 1995, RBT responded to the Defendants' discovery request. With respect to Item 14, RBT responded: "All documents responsive to this request will be produced subject to the above stated general objections." The General Objections

included standard objections based on the work product doctrine, privilege, relevance, and overbreadth, harassment, etc.

In connection with its promissory estoppel and misrepresentation claims, RBT intends to show reliance damages including moving costs, leasing expenses, and attorney's fees. RBT claims it incurred these costs because it moved from its office and production facilities in expectation of combining operations with those of the Defendants. In response to Item 14 of the Defendants July 1995 discovery request, however, RBT did not produce documents relating to these reliance damages. As of the day of trial, nearly three years since the original discovery request, RBT has not produced any such documents.

The Defendants now move the Court in limine to preclude RBT from offering into evidence any materials that should have been produced in response to Item 14.

II. DISCUSSION

Federal Rule of Civil Procedure 37 provides the framework for the enforcement of discovery requests. Rule 37(a) gives a court authority to order one party to comply with the other's legitimate discovery requests. To be entitled to an order compelling discovery, however, the party seeking the order must, among other things, "include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court

action." Fed. R. Civ. P. 37(a)(2)(B); E.D.Pa. R. 26.1(f). These assurances are necessary to prevent parties from seeking a court order in the first instance, without first attempting to resolve a discovery matter between themselves.

Rule 37(b) provides teeth to an order compelling discovery. In the event that a party defies a Rule 37(a) order, Rule 37(b) authorizes the court to punish the offender with sanctions. These sanctions, however, are only available where "a party fails to obey an order to provide or permit discovery." Fed. R. Civ. P. 37(b)(2). See id. advisory committee notes. Because the Defendants never obtained a court order compelling discovery, and RBT never "failed to obey" such an order, sanctions are not appropriate under a direct application of Rule 37.

In support of their Motion, the Defendants cite only Libbi v. Sears, Roebuck & Co., 107 F.R.D. 227 (E.D.Pa. 1985), a case that predates the current version of Rule 37. In Libbi, the defendants propounded interrogatories demanding all information regarding the plaintiff's earnings for the past five years. For eight months the plaintiff repeatedly represented that he would produce certain tax documents, but never produced the information. Finally, on the eve of trial, the plaintiff produced a set of obviously fake tax returns and represented to the court that the returns were genuine. Noting the outrageousness of the plaintiff's conduct, the Court excluded all evidence of plaintiff's alleged lost wages.

The Libbi case is a weak basis on which to exclude evidence in the present case, because the Libbi conduct--as the court noted--

constituted a Rule 11 violation, while the present Plaintiff's failure is a mere nondisclosure. The violation claimed in this case simply does not rise to the level of that in Libbi. Furthermore, the Defendants never demanded the materials from the Plaintiff or filed a motion to compel, and waited until the eve of trial to file their motion in limine. Had they made this demand earlier in the litigation, the Court would not have been left with the binary choice it now faces. Rule 37(a)'s certification requirement was meant to prevent exactly such a situation.

"[T]he exclusion of critical evidence is an extreme sanction, not normally to be imposed absent a showing of willful deception or flagrant disregard of a court order by the proponent of the evidence." In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 791-92 (3d Cir. 1994). Excluding the damage evidence in question would effectively eliminate the Plaintiff's promissory estoppel and misrepresentation claims. This result would be unduly harsh, given the Defendants' failure to raise this issue in the many months before trial. In any case, the Court finds that the Defendants should be capable of challenging the authenticity and reasonableness of any bills the Plaintiff incurred in moving from its offices and production facilities. Accordingly, the Defendants' motion is denied. See Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 156 (3d Cir. 1995) (court has discretion to allow evidence despite technical violation if nonprejudicial to opposing party).

An appropriate Order follows.

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O R D E R

AND NOW, this 30th day of March, 1998, upon consideration of Defendant IMI Cornelius, Inc.'s Motion in Limine to Preclude Plaintiff's Evidence on Damages Relating to Moving Costs and Attorney's Fees, IT IS HEREBY ORDERED that the Motion is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.